United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig — Contains affdt of mailing.

76-1602

To be argued by
ZACHARY W. CARTER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1602

UNITED STATES OF AMERICA,

Appellee,

—against—

JERRY ROSENBLUM,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Jerry Rosenblum appeals from a judgment of conviction entered on December 17, 1976, in the United States District Court for the Eastern District of New York (Neaher, *J.*) following a second jury trial on a multi-count indictment.[1] Appellant was convicted on Count

[1] The first trial on this indictment began on December 8, 1975. Appellant, who was then tried together with a co-defendant, Henry Mayorga, was acquitted of three substantive counts, which charged distribution of, and possession with intent to distribute, cocaine on April 4, 1975 (Counts 4 and 5) and possession with intent to distribute cocaine on April 11, 1975 (Count 8). The jury in the first trial failed to reach a verdict on either Count One, which charged a conspiracy, or on the remaining substantive counts (2, 3, 6 and 7) which alleged distribution and possession with intent to distribute cocaine on April 3 and April 9, 1975. A mistrial was declared as to the open counts of the indictment, and the retrial resulted in the conviction from which appellant appeals. After the first trial Judge Neaher granted defendant Mayorga's motion for a judgment of acquittal after the jury failed to reach agreement on any counts with respect to him.

One of the indictment, which charged a conspiracy to distribute, and to possess with intent to distribute, cocaine on or about and between April 1, 1975 and April 11, 1975, in violation of Title 21, United States Code, section 846.[2] Appellant was sentenced to four years imprisonment to run concurrently with an unexpired special parole term previously imposed, plus a special parole term of six years. The Board of Parole has revoked appellant's parole, and appellant is presently incarcerated.[3]

On appeal, appellant does not challenge the sufficiency of the evidence but raises two issues: (1) whether the Government should have been precluded at the second trial by the doctrine of collateral estoppel from introducing evidence in connection with narcotics transactions which occurred on April 4 and April 11, 1975, and (2) whether the court improperly limited the scope of the direct testimony of proposed defense witness Henry Mayorga.

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[2] The jury failed to reach a verdict on the remaining substantive counts of the indictment, which alleged distribution and possession with intent to distribute cocaine on April 3 and April 9, 1975 and a mistrial as to those counts was declared. Those counts were dismissed on motion of the Government at the time of appellant's sentencing.

[3] In 1973 appellant was convicted on his plea of guilty in the United States District Court for the Eastern District of New York (Rayfield, *J.*) of conspiring to distribute and to possess with intent to distribute cocaine. Appellant was sentenced to six months imprisonment plus a five year special parole term.

Statement of Facts

1. The First Trial[4]

A. The Government's Case

Appellant and co-defendant Henry Mayorga were originally charged in an eight count indictment with conspiring, between April 1 and April 11, 1975, together and with others, to distribute and to possess with intent to distribute cocaine and with the actual distribution of cocaine and the possession of cocaine with intent to distribute on several occasions during the course of the conspiracy.

Among the principal witnesses for the Government were Donald Ackerman and William Kwastel, two of three persons named in the indictment as co-conspirators but not as defendants.[5] Also testifying for the Government were Special Agent Michael Levine of the Drug Enforcement Administration (DEA) who, during the course of the conspiracy, acted in an undercover capacity, and several surveillance agents of the DEA who monitored Levine's activities. In addition to the testimony, tape recordings of several conversations between Kwastel and Agent Levine were played for the jury. From the testimony of these witnesses, the following facts emerged:

Donald Ackerman was introduced to appellant while Ackerman was a sophomore at New York University.

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[4] Since appellant raises collateral estoppel as an issue, the evidence introduced at the first trial is presented here in considerable detail, especially in light of applicable case law, which requires a thorough review of the record of the first trial in cases involving collateral estoppel claims.

[5] The third unindicted co-conspirator, Larry Sussman, did not testify.

Ackerman, who had been dealing in marijuana and hashish, learned through a mutual acquaintance that he might be able to do "business" with appellant. Eventually, a "business" relationship did develop between Ackerman and appellant, highlighted, in April of 1974, by an arrangement whereby Ackerman "disposed of" four ounces of cocaine for appellant. (FT. 552-554).[6]

Ackerman testified that in the later part of March, 1975, he had a conversation with appellant in which they discussed the repayment of approximately $1,000 which appellant owed Ackerman. Appellant told Ackerman that he had a new source of cocaine named "Henry" and suggested that if Ackerman could round up some buyers for the cocaine, appellant might be in a better position to repay some of the debt. (FT. 559-561). A short time after his conversation with appellant, Ackerman learned through Larry Sussman, another "business" acquaintance, that a person named William Kwastel had a buyer for a substantial quantity of cocaine. (FT. 562-564). Unbeknown to Ackerman, Sussman or Kwastel, however, the "buyer" was DEA Agent Michael Levine. During the last week of March 1975, Ackerman met with Sussman and Kwastel and made tentative arrangements for the sale of cocaine to Kwastel's buyer. (FT. 564-566).

On April 2, 1975, Ackerman contacted appellant and informed him that he had a ready and willing buyer for the cocaine. Ackerman suggested that appellant speak to his connection so that definite arrangements could be made for a sale. Later that same afternoon, appellant advised Ackerman that a one ounce sale could be consummated on the following day, April 3, 1975, at the

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[6] For the convenience of the Court, this brief employs the same abbreviations as appellant's brief: "FT" denotes references to the record of the first trial and "R" refers to the record of the second trial; "GX" refers to Government exhibits.

home of his "partners," which was located on 152nd Street in Flushing, New York. (FT. 568-569). Ackerman relayed the information to Kwastel and further told him that he would contact him at a later time to supply detailed instructions on how the transaction would take place.

On the morning of April 3, 1975, appellant, whom Ackerman characterized as "paranoid," laid out elaborate ground rules for the transaction which would take place that afternoon. (FT. 584). He instructed that Ackerman and Kwastel should park about fifteen blocks away from the house on 152nd Street. There, they would wait for ten minutes to make sure they had not been followed. Next, Ackerman and Kwastel would drive to 152nd Street and park near the house. At an appropriate time, appellant would come down to get them and bring them into the building. Once inside, appellant would lead them to a third floor apartment where the deal would actually take place. There, Kwastel would receive the cocaine and would pay appellant. Upon receipt of the cash, appellant would immediately go down to the second floor and deliver the money to his connection, Henry, who would be waiting there. Appellant stated that Henry insisted that he leave the house before anyone else, presumably to avoid the possibility of being "ripped off" for the cash. (FT. 573).

On the evening of April 3, everything went according to plan. In the afternoon, Kwastel and Levine had a conversation in which they discussed the arrangements which had been made for the cocaine sale. (FT. 34; GX 4).[7] As a result of that conversation, at approximately

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[7] This conversation was recorded and played for the jury.

3:15 p.m., Agent Levine met Kwastel and Sussman at Sussman's apartment on 108th Street in Queens. (FT. 36). After Levine arrived, Kwastel received a phone call from Ackerman with further instructions. Pursuant to those instructions, Levine drove Kwastel and Sussman to a location on Queens Boulevard. Levine gave Kwastel $2,000 for the cocaine, and Kwastel left Levine's car. Levine and Sussman then proceeded to 84th Road and Parsons Boulevard where they waited for Kwastel to return. (FT. 38-39).

After leaving Levine and Sussman, Kwastel was met on Queens Boulevard by Ackerman, who drove him, as he had been instructed, to a location approximately fifteen blocks away from the house on 152nd Street where the deal was to be consummated. After about twenty minutes, Ackerman and Kwastel drove to the 152nd Street house and parked across the street. (FT. 586). Agent Carlos Smith followed Ackerman and Kwastel from their meeting place on Queens Boulevard to the vicinity of 82-52 152nd Street where the transaction ultimately took place. (FT. 226-229).

Shortly after Ackerman and Kwastel had arrived, appellant emerged from 82-52 152nd Street, approached the car and told them that his connection was running a little late. Appellant then returned to the building, leaving Ackerman and Kwastel waiting in their vehicle. Shortly thereafter, Ackerman and Kwastel observed two men arrive in a gray Chevrolet and enter the house. Agent Michael Pavlich, who had also established surveillance near the building, also observed the arrival of the two males, and at trial he identified one of them as the defendant Mayorga. Shortly thereafter, appellant emerged, walked to Ackerman's car and escorted both Ackerman and Kwastel into 82-52 152nd Street. This too was observed by Agent Pavlich. (FT. 333).

Once inside the house, appellant took Ackerman and Kwastel upstairs to the third floor apartment. As the trio went up the stairs, Ackerman observed Mayorga standing on the second floor landing. (FT. 589). When the group arrived in the apartment, appellant gave Kwastel one ounce of cocaine, which Kwastel weighed on a scale provided by appellant. Kwastel then handed appellant $2,000. Appellant immediately left the room, went downstairs, and returned without the money. At this point, Agent Curtis Filmore, who was equipped with a camera, observed and photographed Mayorga exit 82-52 152nd Street, enter his vehicle, and leave the area. Agent Filmore then observed Ackerman and Kwastel exit 82-52 152nd Street *after* Mayorga had left. Ackerman drove Kwastel to a point near the location where Agent Levine and Sussman were waiting. Kwastel then delivered the cocaine to Levine. (FT. 594, 41).

During the April 3 transaction Kwastel had informed appellant that he would be interested in purchasing more cocaine on the following day. Appellant indicated that a deal was possible, assuming nothing happened to them as a result of the first sale. (FT. 595).

On the morning of April 4, appellant told Ackerman that he was pleased with the way the transaction had gone the day before. Appellant stated that he would set about making definite arrangements for another transaction to take place that same evening. (FT. 595). Later that day, Ackerman told Kwastel that if he could be in Queens that afternoon or early in the evening with cash, he (Ackerman) could provide Kwastel with cocaine.

Thereafter, Ackerman had another conversation with appellant, in which appellant confirmed that the cocaine would be available. Ackerman suggested that the transaction take place at the Liberty Travel Agency in Forest

Hills where he would be working later that evening. Appellant told Ackerman that he would seek Henry's approval for the new location. (FT. 597). Still later, appellant contacted Ackerman and told him that Henry had approved the plan. Henry would "front" the cocaine to appellant and appellant would in turn bring it to Ackerman's office. Ackerman testified that the plan was for appellant to drive into the parking area behind the travel agency. Ackerman would acknowledge appellant's arrival with a wave from the office window. After Ackerman received a call from Kwastel stating that he was in the area with the cash, Ackerman was to leave the office and get the cocaine from appellant. Ackerman would return to his office, meet with Kwastel, exchange the cocaine for the cash and return to appellant's car to deliver the cash. Ackerman subsequently informed Kwastel of the arrangements which had been made. Kwastel advised Ackerman that he would call him at the travel agency once he, Levine and Sussman arrived in Queens. (FT. 598).

In accordance with the plan that had been worked out, Agent Levine met Kwastel and Sussman at Sussman's apartment at approximately 7:45 p.m. (FT. 49). The three of them then drove to a phone booth on Yellowstone Boulevard, not far from the travel agency, arriving at approximately 8:00 p.m. At that time Kwastel placed a call to Ackerman at the travel agency. Ackerman told Kwastel that in about twenty minutes he would be meeting someone, picking up the cocaine and returning to his office. Ackerman advised Kwastel to call again in about twenty minutes. Approximately twenty minutes later, Kwastel called Ackerman again. (FT. 599). This time, Ackerman told him that he had just seen appellant five minutes before, and he instructed Kwastel to come into his office in exactly seven minutes. Agent Carlos Smith, who had

established surveillance near the travel agency, observed Ackerman leave his office at approximately 8:25 p.m.—within a few minutes of Kwastel's second phone call—and enter appellant's car which was parked behind the travel agency. (FT. 237-238).

After Ackerman entered the car, appellant removed from the glove compartment a York College envelope containing the cocaine and handed it to Ackerman. Before Ackerman left appellant's car, he asked appellant for a list of prices and corresponding weights for cocaine to pass along to his customers. Appellant recited the prices for various quantities of cocaine and Ackerman jotted them down on a piece of paper. Ackerman then left appellant's car and returned to his office. (FT. 600-601). Within minutes, Kwastel arrived at the travel agency and gave Ackerman $4,000 which he had obtained from Agent Levine. Ackerman, in turn, gave Kwastel the cocaine and the price list he had received from appellant. (FT. 601). A short time later, Kwastel left the travel agency, returned to Agent Levine, and delivered the cocaine. Subsequently, Agent Smith observed Ackerman leave his office and return to appellant's car, which was still in the parking lot. (FT. 242-243). Inside the car, Ackerman delivered the proceeds from the sale to appellant. Appellant drove Ackerman a few blocks away and dropped him off. Agent Filmore, who was following appellant's car, observed appellant proceed to and enter the same house on 152nd Street where the April 3rd transaction had occurred. (FT. 385).

On April 7th, Ackerman had a conversation with appellant, in which appellant stated that he and Henry were pleased with the way the two previous sales had gone. Appellant further stated that Henry had come up with some cocaine which he could make available to Ackerman's people (Kwastel and Levine) during that

week. (FT. 603). Tentative arrangements were made for a two ounce transaction which would take place at the travel agency on the evening of April 9th. Ackerman relayed that information to Kwastel, who in turn contacted Levine.

On April 9th, appellant told Ackerman that the cocaine would be available that evening but that the transaction could not be conducted in the same manner as on April 4th since he would not have his car. Instead, appellant said, he would come to the travel agency sometime after 8:00 p.m., drop off the cocaine with Ackerman, and "get lost for awhile." (FT. 606). Later, appellant would return to pick up the money from the deal. Ackerman agreed to those arrangements.

At approximately 8:15 p.m., appellant delivered two ounces of cocaine to Ackerman as planned. At about the same time, Agent Levine met Kwastel and Sussman at Sussman's apartment. As they had done previously, they drove to a phone booth on Yellowstone Boulevard. Kwastel called Ackerman, and Ackerman advised him that he had the cocaine. Levine, Kwastel and Sussman then drove to the vicinity of the travel agency. Kwastel, having obtained $4,000 from Agent Levine, left the car and walked into the travel agency. He gave the money to Ackerman and received the cocaine, which was again contained in a York College envelope. Kwastel left the travel agency and delivered the cocaine to Agent Levine. Ackerman agreed to meet with Levine, Kwastel and Sussman an hour or so later in order to discuss future transactions. (FT. 607).

After Kwastel, Levine and Sussman had left the area, appellant returned to the travel agency and received the cash from Ackerman. After Ackerman informed appellant that he would be meeting with his customers later, appellant counseled him on what to say.

Later on, as arranged, Ackerman met with Levine, Kwastel and Sussman and discussed future transactions. Surveillance agents did not observe appellant on April 9th. (FT. 610).

On April 10th, appellant informed Ackerman that his connection had a quarter of a pound of cocaine available. Arrangements were thus made to sell the narcotics the following day to Ackerman's customers. On April 11, at about 11:00 a.m., Ackerman met appellant in appellant's car in front of a luncheonette which was directly across from the travel agency. Appellant obtained from the trunk of his car another York College envelope, this time containing a quarter of a pound of cocaine. Appellant handed the drugs to Ackerman and instructed him that the deal would have to be consummated as quickly as possible since Henry was leaving town and had to have the money before he departed. (FT. 611-613). Appellant told Ackerman that he would be waiting in a nearby luncheonette. (FT. 612).

During the late morning and early afternoon, Kwastel called Ackerman several times to say that he could not reach Levine. Eventually, Kwastel called Ackerman to advise him that he had spoken to Levine but that it would take a while longer to get the money. At approximately 4:00 p.m. appellant left the luncheonette and entered the travel agency to find out what was taking so long. Appellant left the office after a few minutes. Agent Smith observed this meeting and saw Ackerman show an envelope to appellant. (FT. 249).

Finally, at approximately 4:15 p.m. Agent Levine and Kwastel entered the travel agency. A few minutes later, Agent Smith entered and placed Ackerman and Kwastel under arrest. Agent Smith searched Ackerman and found the York College envelope containing the

cocaine and two one hundred dollar bills whose serial numbers had been recorded and which were part of a list of bills expended in connection with the previous transactions. (FT. 254). Sussman was arrested outside the travel agency. Appellant was arrested across the street from the travel agency.

Eugene Galtman, the Associate Registrar at York College identified the envelopes which had been used in the April 4th, 9th and 11th transactions as envelopes which had been used by York College up until July, 1971 when the college changed its address. Galtman further testified that the college's records showed that Jerry Rosenblum had been in attendance at York College during the periods between the fall of 1970 and the spring of 1973 and also between the spring of 1974 and the spring of 1975. (FT. 766-770).

B. The Defense Case

James J. Falihee, an assistant professor of criminology at John Jay College, was called by co-defendant Mayorga to establish that certain exhibits, including the York College envelopes involved in the transactions and the glasine bags in which the cocaine was further contained, were susceptible to fingerprint analysis. However, neither Mayorga nor appellant sought to submit any of the Government's exhibits to Falihee for analysis. (FT. 808-820).

It was stipulated and agreed between the Government and the defense that the price list received by Levine on April 4th (GX. 9), the envelope which contained the cocaine purchased on April 9th (GX. 14), and the envelope which contained the cocaine seized on April 11th (GX. 17), all of which contained written notations, were all submitted for analysis to a hand-

writing expert, Joseph McNally. McNally compared those exhibits with examples obtained from appellant, Mayorga and Ackerman, but could reach no conclusion as to authorship. (FT. 820-821).

Mayorga took the stand in his own defense. He testified that he had only seen appellant some five or six times. He denied ever having possession of cocaine at any time in his life. He also denied ever selling cocaine to appellant. Mayorga testified further that while he had visited the house at 85-52 152nd Street, he could not recall whether or not he was there on April 3, 1975. Mayorga testified over objection that his friend "Stuart" had informed him that they had spent the afternoon of April 3rd together at Mayorga's house, and that Stuart remembered the date because April 4th was Stuart's birthday. (FT. 828-829). "Stuart" was not called upon to testify by the defense. Mayorga admitted on cross-examination that photographs taken of him by the surveillance agents which depicted him outside 85-52 152nd Street on April 3rd, were true photographs of himself. (FT.).

Appellant did not take the witness stand and called no witnesses.

C. The Mistrial

After deliberating, the jury acquitted appellant of the charges that he possessed cocaine with the intent to distribute and that he distributed cocaine on April 4th (Counts 4 and 5) and that he possessed cocaine with the intent to distribute on April 11th (Count 8). The jury was unable to reach a verdict with respect to appellant on the conspiracy charge (Count 1) or the possession and distribution charges arising from either the April 3rd (Counts 2 and 3) or the April 9th (Counts 6 and 7) transactions. A mistrial was declared.

The jury was unable to reach a verdict on any of the eight counts with respect to defendant Mayorga, and subsequently Judge Neaher granted Mayorga's motion for a judgment of acquittal.

2. The Second Trial

A. The Court's Pre-Trial Ruling

By Notice of Motion dated October 18, 1976, and before commencement of the second trial, appellant moved for an order precluding the Government from offering "any evidence whatsoever" concerning Counts Four, Five and Eight, under which appellant was acquitted at the first trial. Counts Four and Five alleged possession with intent to distribute, and distribution of cocaine on April 4, 1975 and Count Eight alleged possession with intent to distribute cocaine on April 11, 1975. Appellant cited no case authority for the proposition that all such evidence should be excluded.

Judge Neaher, relying on the test set forth in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), found that the acquittal of appellant with respect to Counts Four, Five and Eight did operate as a collateral estoppel, but only with respect to certain specific factual issues that were necessarily determined by the jury in reaching its verdict of acquittal. Judge Neaher framed those factual issues in the following way:

> "Did the defendant possess a quantity of cocaine on April 4? No. Did he distribute a quantity of cocaine on April 4? No. Did he possess a quantity of cocaine on April [11]? No." (R. 150).

Accordingly, the court ruled that the Government would be precluded at the second trial from offering direct evidence which established appellant's possession or distribu-

tion of cocaine on April 4th or April 11th, particularly any testimony from anyone that they had either received cocaine from appellant or seen it in his possession on those dates (R. 321-328). However, Judge Neaher also ruled that he would permit the Government to produce evidence which established contact and communication between appellant and the alleged co-conspirators even if it occurred during the course of either the April 4th or April 11th transaction, on the ground that such evidence was relevant to the conspiracy charge. (R. 164).

B. The Government's Case

The Government tailored the presentation of its case to conform with the court's ruling. As in the first trial, the principal witnesses were Ackerman, Kwastel, Levine and the various surveillance agents. The agents' testimony was substantially the same as in the first trial. However, the testimony of Ackerman and Kwastel was edited significantly in accord with the court's ruling, and was interrupted by frequent sidebars in an effort to avoid troublesome areas. (E.g., R. 193).

Ackerman testified as before regarding the April 3rd transaction (R. 182-191). However, with respect to the April 4th transaction, after he had testified that a drug sale did in fact occur on that day, the court precluded the Government from asking him to describe the manner in which the cocaine was wrapped (he had testified in the first trial that it was contained in a York College envelope). (R. 195-197). The remainder of his testimony about the events of April 4th was as follows:

> "Q. Mr. Ackerman, I'll ask you to answer the next question just yes or no.
>
> Did you have a conversation with Mr. Rosenblum on the 4th?

A. Yes, sir, I did.

Q. And did you see Mr. Rosenblum on the 4th, yes or no?

A. Yes, sir, I did." (R. 199).

Later, in his testimony Ackerman mentioned that during his conversation with appellant on April 4th, appellant had orally given him prices and corresponding weights of cocaine, which he (Ackerman) jotted down. (R. 210).

Ackerman testified as he had at the first trial concerning the events of April 9th (R. 202-205). His testimony concerning April 11th was very limited. With respect to the April 11th transaction, in the context of explaining why that particular deal had to be completed quickly, Ackerman mentioned that the cocaine had been "fronted" to Rosenblum and himself on a non-returnable basis. (R. 206). He also testified, however, that he was personally in possession of the cocaine. The remainder of his testimony regarding appellant and the events of April 11th was as follows:

"Q. Mr. Ackerman, yes or no, did you speak to Jerry Rosenblum on the 11th?

A. Yes, sir, I did.

Q. And yes or no, did you see Jerry Rosenblum on the 11th?

A. Several times."

Kwastel testified concerning the events of April 3rd, 4th, 9th and 11th in substantially the same manner as he had at the first trial (R. 653-674). As before, he was unable to contribute any direct evidence establishing that appellant possessed or distributed cocaine on April 4th or April 11th. He did testify that Ackerman told him that appellant was his (Ackerman's) connection, but he was clearly referring to a conversation between himself and Ackerman which occurred on *April 3rd*, not April 4th. (R. 663).

In addition, received in evidence were the York College envelopes recovered on April 4th, 9th and 11th and the price list from April 4th. (A. 394-395; 399-400; 825-826). And it was stipulated that records of York College showed appellant in attendance there between 1970 and 1975. (R. 983).

C. The Defense Case

The defense called Henry Mayorga for the purpose of establishing that he had been indicted along with appellant and that he, Mayorga, had been acquitted at the first trial. Judge Neaher ruled that Mayorga could not testify with respect to his acquittal as it was not relevant to appellant's case, and further, that he would not be allowed to testify unless it could be established that he was in a position to testify as to his observations of any of the relevant events in the case. The defense asked no further questions of Mayorga. The defense also offered in evidence the tape recorded conversation between Kwastel and Levine. Finally it was stipulated that no fingerprint analysis was conducted on physical evidence recovered in the case and that appellant was 22 at the time of his arrest.

ARGUMENT

POINT I

The evidence which was introduced at the second trial concerning the events of April 4th and April 11th 1975 was not barred by the doctrine of collateral estoppel.

Appellant does not contend that his retrial was barred by operation of either the Double Jeopardy Clause of the Fifth Amendment or the doctrine of collateral estoppel.[8] Rather he argues that because of his acquittal at the first trial on Counts Four, Five and Eight of the indictment, the Government should have been precluded at his second trial from offering "any evidence whatsoever" concerning him in connection with the events of April 4th and 11th, 1975. We respectfully submit that the claim is without merit.

At the outset, we recognize that collateral estoppel is applicable in criminal cases. *United States* v. *Oppenheimer*, 242 U.S. 85 (1916). However, the doctrine has always been defined in terms of ultimate issues of fact, and not, as appellant suggests, in terms of evidence which is offered to prove facts at trial. In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), the Supreme Court defined collateral estoppel this way (397 U.S. at 443):

> "It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."

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[8] Indeed, in view of the legion of case law, counsel for appellant conceded in the Court below that the conspiracy count need not be dismissed by virtue of the previous acquittal on Counts Four, Five and Eight (R. 146). See, *United States* v. *Cioffi*, 487 F.2d 492 (2d Cir. 1973), and cases cited therein.

Moreover, in a criminal case the "defendant has the burden of establishing that the issue he seeks to foreclose from litigation at the second trial was 'necessarily' resolved in his favor by the first verdict." *United States* v. *Seijo*, 537 F.2d 694 (2d Cir. 1976); *United States* v. *Cala*, 521 F.2d 605, 608 (2d Cir. 1975). The *Seijo* Court stated (537 F.2d 697) stated:

> ". . . [T]his burden of proof is a heavy one, since 'it usually cannot be determined with any certainty upon what basis the previous jury reached its general verdict.' *United States* v. *Gugliaro*, *supra*, 501 F.2d at 20."

In his brief, by simply parroting the language of the indictment, appellant claims that the jury at the first trial necessarily determined that the Government failed to establish beyond a reaonable doubt that on April 4, 1975 he "did knowingly and intentionally possess with intent to distribute" one ounce of cocaine. Appellant's Brief, page 19. Presumably, appellant makes a similar claim with respect to Count Eight, which pertained to the April 11th possession. By framing the issue in this broad and indiscriminate manner, appellant seeks to take advantage of the general verdict of acquittal and to evade his burden of establishing *precisely* what *particular* factual issues the first jury necessarily determined in his favor. He thus incorrectly asks the Court to forego the kind of careful analysis mandated in *United States* v. *Cala*, *supra*, 521 F.2d at 608:

> "In determining what issues were necessarily resolved by the prior proceedings, the court is to take a practical approach, examining the record, pleadings, evidence and jury instructions in order to decide whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. *Ashe* v. *Swenson*, *supra*, 397 U.S. at

> 444, 90 S.Ct. at 1194; *Sealfon* v. *United States*, 332 U.S. 575, 579, 68 S.Ct. 237, 92 L.Ed. 180 (1948); *United States* v. *Tramunti*, *supra*, 500 F.2d at 1346. If the jury could have done so in the prior case, the claim of collateral estoppel must fail, since the defendant can prevail only if the issue which he seeks to preclude from consideration was 'necessarily' resolved in his favor in the prior proceeding."

Indeed, application of the *Cala* analysis to the record in this case compels two conclusions: *first*, that appellant has failed to meet his burden of establishing what issue or issues were necessarily decided in his favor by the first verdict, and *second*, that the trial judge correctly determined that the ultimate issues of fact which were necessarily resolved by the first jury in appellant's favor were that he did not possess and distribute cocaine on April 4, 1975 and that he did not possess cocaine on April 11, 1975.

First, it is clear that appellant has not established that the first jury necessarily determined in his favor the broad issue of whether on April 4, 1975 appellant possessed cocaine with the intent to distribute. At the conclusion of the first trial, Judge Neaher charged the jury with regard to the possession counts of the indictment. He defined the terms "knowingly and intentionally" (FT. 998), and he explained the term "with intent to distribute" (FT. 999). However, no *Pinkerton* instruction was given with respect to the substantive counts. *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Thus, the court set forth the separate elements of the substantive offense, each of which elements the jury was requird to find beyond a reasonable doubt in order to convict, and each of which elements the jurors were thus obliged to consider. Appellant advances *no* argument from which one could conclude

that the jury *necessarily* resolved *each* of those issues favorably to him. Similarly, he makes no such effort with regard to the April 4th distribution count and the April 11th possession count.

On the contrary, the facts suggest, as we believe Judge Neaher correctly determined, that the jury may have believed that appellant intended that cocaine should be distributed but that he had neither actual nor constructive possession of the cocaine on April 4th or April 11th. It follows, of course, that without possession there could be no distribution. Indeed, Judge Neaher's conclusion is well supported by the record. At the first trial, there was a great deal of circumstantial evidence linking appellant to the conspiracy and to the distribution of cocaine on April 3rd, 4th and 9th and the aborted sale on the 11th. However, the only direct testimony actually placing narcotics in the hands of appellant came from Ackerman, whose testimony the judge instructed the jury to weigh with great care (FT. 1020). In addition, it is particularly significant that the first jury was unable to reach a verdict on the conspiracy charge, for this further supports the view that the question of intent was not the ultimate issue of fact which was necessarily resolved in appellant's favor by the acquittals under Counts Four, Five and Eight.[9] Compare *United States* v. *Tramunti*, 500 F.2d 1334 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974).

It appears, therefore, that, as Judge Neaher stated before the start of the second trial, the issues of fact which were necessarily determined in appellant's favor by the first jury's not guilty verdict, were *first*, that appel-

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[9] Of course, the jury could, theoretically, have decided that appellant distributed cocaine unknowingly and unintentionally, but we submit that in light of the evidence and the jury's failure to reach a verdict on the conspiracy count this is a most unlikely possibility.

lant did not *possess* cocaine on April 4, 1975, *second* that appellant did not *distribute* cocaine on April 4, 1975 and *third* that appellant did not *possess* cocaine on April 11, 1975. Thus, the only question remaining is whether the trial judge effectively foreclosed from the second jury's consideration these ultimate issues of fact which had necessarily been resolved in appellant's favor by the first jury. We believe that he did.

Before the second trial commenced, Judge Neaher undertook to preclude government witnesses from testifying, as they had done in the first trial, about any incident of possession or distribution of cocaine by appellant on either April 4th or April 11th. In stating his intentions in that regard, the court said that it was drawing "a rather sharp line" since it was limiting testimony only to the extent that a witness was precluded from stating that he actually saw appellant in possession of cocaine. (R. 321). Judge Neaher explained his position clearly:

> "[A]ll I'm saying is that the jury acquitted this defendant of possession of cocaine on that date [April 11].
>
> It has not acquitted him of conspiracy and he is on trial for conspiracy and whatever action may have a bearing on his awareness that one of the co-conspirators had cocaine, is different from saying substantively that he had it (R. 159).
>
> * * * * *
>
> "Nevertheless, as I say, since we are talking about the crime of conspiracy, the Government has the right to produce the evidence of contact and communication between this defendant and the alleged co-conspirators, and that is primarily what I think would be the thrust of that proof." (R. 160)

In accordance with his stated position, Judge Neaher closely supervised the testimony of Donald Ackerman, interrupting on several occasions to steer government counsel away from dangerous waters (eg. R. 193, 195-198). In fact, the court restricted Ackerman's testimony with respect to April 4th and April 11th, by precluding Ackerman from testifying that the cocaine was contained in a York College envelope. Thus, with all direct evidence of appellant's possession and distribution on April 4th and his possession on April 11th excised from the case, the jury was left with a set of facts which strongly indicated that appellant was associated with the other co-conspirators and with the illegal venture, but which did not establish that he possessed or distributed cocaine on the dates in question. In this connection, it should be noted that even with the direct testimony of Ackerman, the first jury was not persuaded that appellant was guilty of possession and distribution on April 4th and possession on April 11th.

Appellant complains that the circumstantial evidence admitted with regard to April 4th and April 11th—the York College envelopes, the price list, the testimony that Ackerman and appellant met—suggested that appellant possessed and distributed cocaine on those dates. Judge Neaher pointed out several times that appellant's presence at those transactions was consistent with his role as overseer of the operation, and the observations of the surveillance agents on those dates tended to establish an association between appellant and Ackerman. The fact that the York College envelopes were admitted into evidence likewise is of little probative value on the issue of possession and distribution, absent direct testimony putting the cocaine-filled envelopes in Ackerman's possession. Without such testimony, the envelopes simply associated appellant with the venture. And the jury *had* to notice the conspicuous absence of direct evidence in that regard. Again, not one, but two juries were left unsatisfied as to the

guilt of appellant on any substantive count. Ackerman's statement that he and appellant were "fronted" the cocaine on April 11 does not necessarily suggest that appellant possessed cocaine on that date. Indeed, the only testimony from Ackerman on that point was that he, Ackerman, personally had possession of the cocaine.

Perhaps most important of all, the Government, ever cognizant of Judge Neaher's ruling, never argued that the facts suggested that appellant possessed and distributed cocaine on April 4th and April 11th. On the contrary, the Government studiously avoided making such an argument in summation.

We submit, therefore, that the record in this case establishes that the only issues necessarily determined in appellant's favor at the first trial were that he did not possess or distribute cocaine on April 4, 1975 and that he did not possess cocaine on April 11, 1975. Furthermore, Judge Neaher effectively precluded the Government from proving the conspiracy against appellant by re-litigating those issues of fact.

The decisions upon which appellant relies are all markedly different from the case at bar. Each of them involves a situation where, unlike here, the prosecution relitigated at the defendant's trial an issue of fact previously determined in the defendant's favor.

In *Sealfon* v. *United States*, 332 U.S. 575 (1948), the defendant was first tried for conpiring to defraud the United States with respect to the rationing of sugar, by presenting false invoices and making false representations to a ration board to the effect that certain sales of sugar products were made to exempt agencies. The defendant was acquitted of the conspiracy charge. Subsequently, the defendant was tried for the substantive offense of

uttering and publishing as true the false invoices and was convicted. The government's case at the second trial was based almost entirely upon an alleged illegal agreement between the defendant and another individual, which was necessarily found in the first trial to have been nonexistent. Thus, "because the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense," the Supreme Court held that the doctrine of collateral estoppel required reversal of the conviction on the substantive offense. 332 U.S. at 578. Here, the United States did not relitigate defendant's possession and distribution of heroin on April 4th and 11th. In addition, in view of the other evidence in the case, in particular the testimony concerning the cocaine sales of April 3rd and 9th, it can hardly be said that the limited evidence which was introduced concerning the 4th and 11th pertaining to appellant was a significant factor in his conviction.

In *Harris* v. *Washington*, 404 U.S. 55 (1971), the defendant was tried in state court for the murder of one Ralph Burdick and was acquitted. Burdick, together with Harris's son, was killed when a bomb sent through the mail exploded in Burdick's home. Subsequently, Harris was indicted for the murder of his son. The Court concluded that collateral estoppel barred the prosecution because it had already been determined in Harris's favor that Harris did not send the bomb through the mail.

United States v. *Kramer*, 289 F.2d 909 (2d Cir. 1960), involved a prosecution for (i) conspiring to burglarize post offices in Wilton and Orange Connecticut and to receive stolen postal property and for (ii) the substantive offense of receiving stolen postal property. Previously, the defendant Kramer had been acquitted of the charges of burglarizing the Connecticut post offices and of theft from the post offices. At the conspiracy trial,

the government offered testimony identical to that given in the first trial, to show that Kramer was inside the post offices at the time of the burglaries. In reversing Kramer's conviction, this Court pointed out that the acquittals on the burglary and theft charges were based on the jury's finding that Kramer was never inside the post office. Hence, this issue could not be relitigated.

In *Phillips* v. *United States*, 502 F.2d 227 (4th Cir. 1974), the defendant Phillips was first indicted and charged with armed robbery of a federally insured bank. The jury acquitted Phillips of the charges. Significantly, in the course of its deliberations the jurors asked what they should do if they believed that Phillips was involved in the bank robbery but not in the bank at the time of the robbery. The trial judge replied that under these circumstances the verdict had to be not guilty. Following his acquittal, Phillips was indicted and convicted of illegally possessing money stolen in the bank robbery of which he was acquitted. At the second trial, the prosecution's case was built around evidence showing that Phillips was involved in the bank robbery. The Fourth Circuit reversed the conviction on the grounds that "the government sought to prove precisely the same factual issue that had been foreclosed by the result in the first trial;" namely, Phillips's presence in the bank and his participation in the robbery.

United States v. *Phillips*, 401 F.2d 301 (7th Cir. 1968), involved the prosecution of a defendant for the sale of heroin on July 17, 1964. The government used, as a similar act, evidence of a July 14, 1964 heroin sale, for which defendant had previously been acquitted in a bench trial. The judge in the previous case gave as his reasons for acquitting defendant that he was not convinced that defendant was aware of 'what was going on' on July 14th and, alternatively, that defendant's actions 'did not

In conclusion, it is enough to simply reiterate that in this case the Government did not relitigate the issue of appellant's possession and distribution of cocaine on April 9th and his possession of cocaine on April 11th. The doctrine of collateral estoppel was not violated.

POINT II

The court's rulings with respect to the testimony of defense witness Mayorga were correct.

Defense counsel, in an apparent attempt to inform the jury that former co-defendant Henry Mayorga had been indicted along with appellant but was somehow no longer in the case, called Mayorga to the witness stand and posed a question containing the prejudicial information. (R. 881). Appellant now "professes shock" at Judge Neaher's ruling to the effect that Mayorga could testify only if it was established by a proper foundation that he was competent to contribute relevant testimony.

After defense counsel asked that first question, there was extensive colloquy at the sidebar. (R. 883-909). Defense counsel asked that he be allowed to elicit from Mayorga conclusory statements that he (Mayorga) was not a member of a narcotics conspiracy along with Ackerman and appellant. Further, he sought permission to ask Mayorga whether he had ever been charged with distributing cocaine. Judge Neaher properly denied both requests, insisting that defense counsel question the witness only with respect to factual issues in the case. The court correctly stated:

> "You ask him facts. You ask him whether he was at the house at that day and where he was in the house and that is the kind of question you put to him. . . . He is here as a fact witness and nothing else." (R. 883).

constitute active transfer or the aiding, abetting, counselling or procuring such act of transfer.' *Supra* at 305. The court of appeals concluded that the prior proceeding had determined that the defendant's state of knowledge and level of participation in the July 14th transaction did not satisfy the elements of the offense. The court further concluded that evidence of defendant's state of mind and extent of participation in the July 14th sale could not easily be excised from the rest of the evidence pertaining to the July 14th sale; and that it was not effectively removed from the jury's consideration. Hence, Phillips' conviction was reversed. The case at bar presents a very different situation. The issue of fact necessarily decided at appellant's first trial did not involve the operation of appellant's mind, but rather a very definite occurrence—namely that he did not have actual or constructive possession of cocaine on April 4th or April 11th. That fact could have been established by direct proof and that proof was removed from the jury's consideration. Had the first jury's verdict somehow indicated that it believed appellant possessed cocaine but did not intend to distribute it, then the task of exclusion at the second trial would have posed the difficulties presented in *United States* v. *Phillips*, *supra*. Such was clearly not the case, however.

Similarly, *Wingate* v. *Wainwright*, 464 F.2d 209 (5th Cir. 1972), involved an effort by the prosecution to prove, as a similar act, an offense for which a defendant had been acquitted at a previous trial. In that case, the prosecution, on defendant's robbery trial, presented evidence of two prior robberies for which the defendant had been tried and acquitted. The *Wingate* court determined that the jury necessarily determined that the defendant had not committed the robberies for which he was acquitted, and the prosecution was therefore barred from re-proving those robberies as similar acts.

The court also advised defense counsel that it would allow him to develop a line of questioning concerning whether or not Mayorga was present at 85-52 152nd Street on April 3, 1975, whether he knew Ackerman, and whether he (Mayorga) was part of a plan whereby he would receive money and leave the house ahead of everyone else. (R. 881-910). Instead of pursuing that line of questioning, however, appellant's attorney persisted in his request for permission to ask conclusory questions about whether Mayorga was a co-conspirator with appellant. Defense counsel argued that he should be allowed to refute Ackerman's testimony regarding statements by appellant which mentioned "Henry" through te witness Mayorga. Judge Neaher ruled that Mayorga's denial of his involvement in a conspiracy with appellant would not be relevant even to impeach Ackerman's testimony, since at best it might show that appellant had lied to Ackerman. And since the government was only required to prove that appellant possessed cocaine, it would not be relevant to establish that he did not receive it from Mayorga. Judge Neaher reiterated a number of times that defense counsel could inquire about the episode in the house on 152nd Street, stating explicitly that he would be allowed to inquire as to whether Mayorga had received any money from Rosenblum on April 3, but defense counsel declined.

Clearly defense counsel was not presented with the "Catch 22" situation appellant suggests. The court properly excluded under Rule 403 of the Federal Rules of Evidence testimony from Mayorga that he had formerly been a co-defendant with appellant. Such testimony was irrelevant and would have been unfairly prejudicial. Similarly, Judge Neaher correctly ruled that Mayorga could not simply take the stand and testify in a wholly conclusory manner. First, in accordance with the fundamental rules of evidence, a foundation had to be laid to establish Mayorga's competence as a witness. Rule 602 of

the Federal Rules of Evidence. See also 2 Wigmore on Evidence §§ 654, 657 (3rd Ed.). Mayorga was treated no differently than any other witness in that regard. Appellant's claim is without merit.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
March 8, 1977

Respectfully submitted,

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★ U. S. Government Printing Office 1977— 714-018-066

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN N. JOHNSON, being duly sworn, says that on the 11th day of March, 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a 2 cys of the Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Hoffman, Pollok, Mass & Gasthalter, Esqs.
477 Madison Avenue
New York, NewYork 10022

Sworn to before me this
11th day of March, 1977

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1979

Carolyn N. Johnson
CAROLYN N. JOHNSON